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State Liquor Affirmation Practices: Constitutional and Antitrust Problems

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STATE LIQUOR AFFIRMATION PRACTICES: CONSTITUTIONAL AND ANTITRUST PROBLEMS

I. INTRODUCTION

In October of 1971, the attention of Pennsylvania citizens was focused for the first time on a situation which has existed within the national liquor[1] industry virtually without question since 1938. The national affirmation[2] policy—under which liquor manufacturers affirm under oath that the price at which liquor is being offered is no higher than the lowest price at which it is offered anywhere else in the nation—has received sharp and continued criticism from the chief counsel of the Pennsylvania Liquor Control Board,[3] who has charged that because of affirmation, Pennsylvania citizens were being forced to pay inflated prices on liquor purchased from state liquor stores.[4]

The public controversy reached a crescendo on April 21, 1972. At a public hearing held by the P.L.C.B. to investigate price increases, the Attorney General of Pennsylvania, J. Shane Creamer, summarized the situation as he understood it, recommending immediate legal action:

> It is apparent then that Pennsylvania has had a problem in the operation of its monopoly system. It has one of the highest retail consumer price structures in the nation yet simultaneously has suffered a comparatively low realization of revenue returned to the Commonwealth. This anomalous position results in part from the so-called

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1. The term "liquor" as used in this Comment shall mean what is commonly known as "hard liquor," *i.e.* whiskies, rums, cordials, brandies, gins, wines, etc. The term is defined by the Pennsylvania Liquor Code, PA. STAT. ANN. tit. 47, § 2-102 (1969), as:

> any alcoholic, spiritous, vinous, fermented or otherwise alcoholic, including all drinks or drinkable mixtures, and reused, recovered, or redistilled denatured alcohol usable or taxable for beverage purposes which contain more than one-half of one per cent of alcohol by volume, except pure ethyl alcohol and malt or brewed beverages.

2. *See* notes 67-76 and accompanying text *infra*.

3. The Pennsylvania Liquor Control Board [hereinafter referred to as P.L.C.B. or the Board] is an administrative body established in 1933, PA. STAT. ANN. tit. 47, § 2-207 (1969) to regulate and supervise the sale of alcoholic beverage within the Commonwealth. One of its primary responsibilities is the operation of "State Stores," the only permissible bottle sales outlet for liquor within the state.

4. Press release from the Office of the Chief Counsel, P.L.C.B., Feb. 26, 1972.

"National Affirmation Policy" and in part from the mark-up policies of the Liquor Control Board dating back to 1955.

. . . .

In actual practice affirmation laws have permitted liquor manufacturers to maintain artifically high wholesale prices; under the present system manufacturers can raise their prices at will.

. . . .

It is time for the affirmation laws to be challenged. In light of the experience gained over the past eight years since passage of the original New York statute, I am convinced that such statutes are unconstitutional. These laws and the regulations and policies adopted in their wake work to the detriment of Pennsylvania consumers who are forced to pay more than is justified considering Pennsylvania's tremendous buying power. Affirmation should be strangled before it strangles us.[5]

The recommendations of Pennsylvania's Attorney General were shortly followed. On December 5, 1972, the Pennsylvania Department of Justice brought suit in the Supreme Court of the United States on behalf of the Commonwealth of Pennsylvania against twenty-five states,[6] charging that the affirmation practices of each of these states placed an undue burden on interstate commerce.[7]

This Comment will trace the development of the national affirmation policy, discuss its practical effect upon one state—Pennsylvania—and analyze the constitutionality of affirmation statutes, regulations and policies under the commerce clause,[8] the privileges and immunities clause,[9] and the twenty-first amendment[10] of the Federal Constitution, employing as a representative example the New York Statute.[11]

II. Background

On December 5, 1933, the twenty-first amendment[12] to the United States Constitution was ratified, repealing the eighteenth

5. *Statement of the Attorney General Before the Pennsylvania Liquor Control Board at Public Hearing on April 21, 1972.*

6. The states as named were: New York, Kansas, Massachusetts, New Mexico, South Carolina, Georgia, New Jersey, Oklahoma, Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming.

7. Although the Court has twice refused to hear arguments on this case, it should be noted that these constitute denial of *original* jurisdiction. Pennsylvania is at present seeking adjudication of the question through other channels, and it is possible that the Court will again be faced with the question.

8. U.S. Const. art. 1, § 8, cl. 3.

9. U.S. Const. amend. XIV.

10. U.S. Const. amend. XXI.

11. N.Y. Alco. Bev. Control § 101-b-3 (McKinney Supp. 1964).

12. U.S. Const. amend. XXI.

amendment[13] and thereby ending the nearly thirteen year reign of prohibition. Shortly thereafter, in 1935, representatives of several states met in Des Moines, Iowa, deliberated for nearly three weeks and concluded by signing a pact which was to become known as the Des Moines Convention.

Exactly what prompted these men to convene is unclear, but the result of their meeting is a matter of record. A resolution was adopted to the effect that every state purchasing liquor for distribution through state owned and operated retail outlets[14] would insist, as a condition of purchase, that the vendor contractually agree that the sales price on each offered item would be no higher than the lowest price at which the same product was being offered anywhere else in the nation.[15]

The document itself was never made public, but its effects were clear. Each control state maintained close price checks on every other control state, and when a pricing discrepancy appeared, notification was given to the concerned liquor vendor, requesting reimbursement for the overcharge under the terms of the contractual agreement. The procedure functioned smoothly, assuring each control state identical wholesale pricing regardless of the number of cases purchased annually. Inherent in the system, however, was a problem: it failed to include the thirty-two non-control[16] states within its guaranteed minimum price structure.

In 1963, Governor Nelson A. Rockefeller of New York (a non-

13. U.S. CONST. amend. XVIII.

14. Such states are commonly known as, and hereinafter referred to as, "Control states." At the time of the Convention, there were sixteen control states, including Idaho, Iowa, Maine, Michigan, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming. Today control states include all of the above, plus Alabama and Mississippi and Montgomery County, Maryland.

15. Affirmation is required by law in Kansas, Massachusetts, New Mexico, New York, and South Carolina. The states of Georgia, New Jersey and Oklahoma require affirmation by regulation. Affirmation is authorized by law in the State of Maryland, but it has never been implemented by the administrator. The following states, which include the eighteen control states as well as the 117 county and city boards of North Carolina, plus Montgomery County, Maryland, require a price guarantee based on the quotations and the purchase orders: Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming.

16. These "license" states include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas.

control or license state) reacted to this situation by appointing a Moreland Commission to undertake:

> [a] thorough study and reappraisal of the [New York Alcoholic Bevarage Control] Law with respect to the sale and distribution of alcoholic beverages in the state, to examine and investigate . . . the methods and practices of manufacturers, distributors and retailers of alcoholic beverages in the State and to propose any revisions of the New York law which might be found necessary.[17]

The Commission's findings as to pricing were both startling and illuminating: A comparison of sale prices for eighteen items in Washington, D.C., also a non-control jurisdiction, and New York was conducted, revealing that in fifteen instances, Washington *retail* prices were lower than New York *wholesale* prices for the same item.[18] Governor Rockefeller reported the result:

> New York consumers have been compelled to pay on the average $1.00 more per fifth of liquor than they would have to pay if there were a free market. . . . The total bill for this surcharge foisted on New Yorkers now runs to $150 million a year and it is rising every year.[19]

On the basis of these findings, among others,[20] the Moreland Commission recommended that "Section 101-c of the ABC(Alcohol Beverage Control) Law, which provides for SLA (State Liquor Authority) enforcement of minimum consumer resale prices fixed by the distillers, should be repealed."[21] Upon receipt of this recommendation, Governor Rockefeller called for immediate repeal of Section 101-c.[22] The New York Legislature responded promptly, repealing the offending section by adopting section 11 of chapter 531 on April 16, 1964.[23]

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17. N.Y. Exec. Order No. 2-15, February 15, 1963.

18. New York State Moreland Comm'n on the Alcoholic Beverage Control Law, *Report and Recommendations* No. 3, January 21, 1964, Chart 3 at 6. [hereinafter cited as *Moreland Report*]:

Brands	Price N.Y. Wholesale 1/12 of Case Price	Economy Prices Washington, D.C.	N.Y.
Seagram 7 Crown	3.77	3.49	4.99
Seagram V.O.	5.01	4.99	6.65
Canadian Club	4.94	4.99	6.55
Old Crow 86	4.10	3.39	5.45
Imperial	3.41	3.18	4.50
Jim Beam	3.83	3.49	5.10
Calvert Reserve (Extra)	3.77	3.49	4.99
Schenley Reserve	3.77	3.49	4.99
Early Times	4.11	3.79	5.45
Ancient Age	4.51	3.59	5.95
Corby's Reserve	3.40	2.99	4.49
Flushmann Preferred	3.44	3.18	4.55
Ten High	3.41	3.18	4.50
Old Taylor 86	4.51	4.29	5.95
Cutty Sark	5.25	5.59	7.11
Four Roses	3.91	3.69	5.19
J & B	5.33	5.95	7.09
Kentucky Gentleman	3.61	3.39	4.79

19. Address to the Legislature, February 10, 1964 at 8.

20. *See generally Moreland Report*, Nos. 1-5.

21. *Moreland* Report, *supra* note 18, No. 3, at 30.

22. Address to the Legislature, February 10, 1964 at 9.

23. N.Y. ALCO. BEV. CONTROL § 101-b-3 (McKinney Supp. 1964).

It should at this point be noted that the Moreland Report called only for repeal of section 101-c,[24] thus creating a "free market"[25] and in theory correcting the inflated pricing structure present in the state. The New York legislature went beyond this recommendation, however, instituting sweeping changes.[26] Reasoning that "price discrimination and favoritism are contrary to the best interest and welfare of the people of this state,"[27] that "fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor" in New York[28] and that New York consumers should not be discriminated against by paying prices "unjustifiably higher"[29] than are "paid by consumers in

24. *See* text accompanying note 21 *supra.*
25. *See Moreland Report, supra* note 18, No. 3, at 9.
26. N.Y. ALCO. BEV. CONTROL § 101-b-3 (McKinney Supp. 1964). This section provides in part:

> . . . .
> (e) There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor will be sold by such person to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, (i) at any time during the calendar month for which such schedule shall be in effect, and (ii) if a like affirmation has been filed at least once but was not filed during the calendar month immediately preceding the month in which such schedule is filed, then also at any time during the calendar months not exceeding six immediately preceding the month in which such schedule shall be in effect and succeeding the last calendar month during which a like affirmation was in effect.
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> (f) In the event an affirmation with respect to any item of liquor is not filed within the time provided by this section, any schedule for which such affirmation is required shall be deemed invalid with respect to such item of liquor, and no such item may be sold to or purchased by any wholesaler or retailer during the period covered by any such schedule.
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> (g) In determining the lowest price which any item of liquor was sold in any other state or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler or state (or state agency), as the case may be, purchasing such item in such other state or in the District of Columbia; provided that nothing contained in paragraphs (d) and (e) of this subdivision shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this paragraph, the term "state taxes or fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon the gallon of liquor, and the term "gallon" shall mean one hundred twenty-eight fluid ounces.

27. N.Y. ALCO. BEV. CONTROL § 101-b-3, (McKinney Supp. 1964).
28. *Id.*
29. *Id.*

other states,"[30] the legislature concluded that it was necessary to enact section 9 of chapter 531[31] "in order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage."[32] Most important among the provisions of section 9 was a requirement that distillers of alcoholic beverages could charge New York wholesalers a price "no higher than the lowest price"[33] charged by the brand owner, a wholesaler designated as his agent or by a "related person"[34] to any wholesaler elsewhere in the United States (including any control state) during the immediately preceding month.[35] An affirmation to that effect, verified by the vendor, was required to be filed with the state Alcoholic Beverage Commission each time a price change occurred or a new brand was listed,[36] in the absence of which the item could not be sold in the state.[37] The affirmed price was a net figure, appropriately reduced by all "discounts, . . . rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state (or state agency) or retailer"[38] purchasing the item elsewhere in the country.

These were the provisions of the New York statute, which in conjunction with similar statutes, regulations and policies of the other named defendants, Pennsylvania's Attorney General viewed as unconstitutional[39] because thereunder Pennsylvania citizens were compelled to pay higher prices for alcoholic beverages than would otherwise be necessary.[40] The bases for this charge were twofold: First, distillers were thereby freed completely from all normal commercial checks accompanying at-arms-length transactions; and second, closely tied with the first, Pennsylvania could not bargain with distillers for prices lower than those offered to New York, even if such lower prices could be justified.

The argument underlying the first basis was grounded on past Pennsylvania experience. In 1958, Joseph E. Seagrams & Sons, Inc.[41] quoted an across-the-board price hike on all of its items offered to the Board. After reviewing general conditions of the industry and the liquor market, the Board concluded that the price increases were unjustified. This conclusion was presented to Seagrams, accompanied by the suggestion that Seagrams should present some justification for their price rise. The distillers refused,

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30. *Id.*
31. N.Y. ALCO. BEV. CONTROL § 101-b-3, §§ (d)-(k) (McKinney Supp. 1964).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* § (h).
37. *Id.* § (i).
38. *See* text accompanying note 6 *supra*. *See also* note 15 *supra*.
39. *See* note 5 and accompanying text *supra*.
40. *Id.*
41. Hereinafter referred to as "Seagrams."

and the Board announced that unless prices remained stable or justification were presented, no further purchases of Seagrams' products would be made. Faced with this ultimatum, Seagrams attempted reasoning with the Board, explaining that if prices were not raised to Pennsylvania, they could not be raised in any of the other affirmation states, conceding that although the company might be willing to maintain present prices to Pennsylvania, the consequences of such an act made it economically impossible. Pennsylvania responded by threat, delisting all Seagrams products in 1958. This had no effect, however, and in the face of consumer demands, Seagrams products were restored to Pennsylvania's Liquor Store price lists within six months. The Attorney General suggested that this was a standardized procedure, that any distiller could at will increase his price without fear that serious objections would be made, thereby placing both Pennsylvania consumers and consumers throughout the nation at the distillers' mercy, subject only to their good conscience.[42] Although factual proof of this allegation is beyond the scope of this Comment, it should be noted that nothing has been encountered in the course of research to indicate that the present situation is other than as described by Pennsylvania's Attorney General.

The second basis for the Attorney General's charge includes the first, but additionally posits that even if successful negotiations were possible, any pricing concessions gained could not be realized because foreclosed by affirmation. This argument is a comparatively simple one, following naturally from the concept of affirmation. It is perhaps best demonstrated through the medium of a hypothetical. Suppose the P.L.C.B. successfully negotiates a price reduction of fifty cents per case on all Seagrams products because of smaller costs normally associated with large sales to a single customer. If the products involved are sold only in Pennsylvania, no problem arises. But if sold in any affirmation state, distinct difficulties are encountered. To comply with affirmation requirements, Seagrams must offer the same price reduction to every wholesale purchaser within the affirmation states. This situation can be viewed in two ways: First, since the same price is being offered everywhere, the price reduction is no longer a discount reflecting lower costs; or second, affirmation flatly forbids a discount to be given to Pennsylvania because to do so would be to sell a product to Pennsylvania at a price lower than that offered to affirmation states. Viewed either way, Pennsylvania is precluded from bargaining for lower prices by affirmation requirements in other states, a situation seen as unconstitutional by

42. *See* note 5 and accompanying text *supra*.

Pennsylvania's Attorney General. The remainder of this Comment will consider the legal validity of that contention.

III. THE TWENTY-FIRST AMENDMENT AND THE PRIVILEGES AND IMMUNITIES CLAUSE

The tenth amendment to the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[43] Under this amendment, the peoples of the various states, acting through their legislatures, may exercise any governmental power not given up to the federal government.[44] Among those powers retained by the people is the exercise of the police power,[45] the power to pass legislation for the general welfare of the people. It is generally recognized that under this power a state legislature is virtually unrestricted in the enactment of laws respecting the manufacture, sale, possession, transportation, or use of intoxicating liquor.[46]

With the ratification of the eighteenth amendment[47] on January 29, 1919, these powers underwent major modification. Under that amendment, the "transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes [was] prohibited. . . ."[48] as of January 29, 1920. Although the amendment did not prohibit a state from enforcing its provisions under existing state statutes,[49] to the extent that such statutes conformed to the tenor of the amendment,[50] state legislation could not, of course, give validity to acts therein prohibited.[51]

All powers removed by the eighteenth amendment were by the twenty-first amendment restored to the states.[52] Greater power was, however, vested in the federal government than had previ-

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43. U.S. CONST. amend. X.

44. *See* Jamison v. Flanner, 116 Kan. 624, 338 P. 82 (1934), for a discussion of this question as it pertains to the pardoning power.

45. U.S. CONST. amend. X.

46.
> Such local laws derive their force, . . . not from the eighteenth amendment, but from power originally belonging to the states, preserved to them by the 10th amendment, and not relieved from the restriction heretofore arising out of the Federal Constitution.

United States v. Langa, 260 U.S. 377, 381-82 (1922). *See also* Manning v. Davis, 166 Kan. 278, 201 P.2d 113 (1948); Commonwealth v. Gardner, 297 Pa. 498, 147 A. 527 (1929).

47. U.S. CONST. amend. XVIII.

48. U.S. CONST. amend. XVIII, § 1.

49. United States v. Peterson, 268 F. 864 (D.C. Wash. 1920), *rev'd on other grounds*, 260 U.S. 377 (1921). The eighteenth amendment vested concurrent enforcement powers in Congress and the states.

50. Alexander v. State, 148 Ark. 491, 230 S.W. 548 (1921); Hazel Drug Co. v. Wilner, 284 Pa. 361, 131 A. 286 (1925); Miller v. Commonwealth, 135 Va. 597, 115 S.E. 512 (1923).

51. *See* McCormick and Co. v. Brown, 286 U.S. 131 (1932).

52. Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939). *See also* Dickinson v. Commonwealth, 181 Va. 313, 24 S.E.2d 550 (1943), *aff'd*, 321 U.S. 131 (1944).

ously been enjoyed, in that Congress now had the power to regulate interstate commerce in alcoholic beverages to the point of complete prohibition.[53]

Following ratification of the twenty-first amendment Pennsylvania, in common with every other state in the nation, had the power to absolutely prohibit the manufacture, transportation, sale or possession of alcoholic beverages[54] or to condition such manufacture, transportation, sale or possession by measures reasonably appropriate to effectuate the degree of control deemed by its legislature to be necessary and proper.[55] Pursuant to these powers, Pennsylvania in 1933 created the Pennsylvania Liquor Control Board,[56] vesting in it the power[57]

> (a) To buy, import or have in its possession for sale, and sell liquor and alcohol. . .
>
> . . . .
>
> (b) To control the manufacture, possession, sale, consumption, importation, use, storage, transportation and delivery of liquor, alcohol and malt or brewed beverages . . . and to fix the wholesale and retail prices at which liquors and alcohol shall be sold at Pennsylvania Liquor Stores. . . .
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> (c) [T]o make such regulations . . . as it may deem necessary. . . . Such regulations adopted by the Board shall have the same force as if they formed a part of this act.[58]

Thus, Pennsylvania's citizens, acting pursuant to the twenty-first amendment, decided through proper legislative procedures that alcoholic beverages could be sold to and consumed by any adult,[59] provided that such alcoholic beverages be bought through the medium of state stores owned and operated by the Commonwealth, subject to such rules and regulations as the P.L.C.B. deemed necessary.

Pennsylvania's Liquor Control Board thus would appear to have the same basic rights relative to alcoholic beverages as those enjoyed by the various citizens of the United States prior to ratification of the eighteenth amendment,[60] since the powers re-

53. Duckworth v. State, 201 Ark. 1123, 148 S.W.2d 656 (1941), *aff'd*, 314 U.S. 390 (1943); Harris v. State, 74 Okla. Crim. 13, 122 P.2d 401 (1942).
54. Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939).
55. Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966); Krauss v. Sacramento Inn, 314 F. Supp. 171 (C.D. Cal. 1970); Edilbrew Brewery v. Weiss, 170 Pa. Super. 34, 84 A.2d 371 (1951).
56. PA. STAT. ANN. tit. 47, § 2-201 (1969).
57. PA. STAT. ANN. tit. 47, § 2-207 (1969).
58. *Id.*
59. PA. STAT. ANN. tit. 47, § 4-493(1) (1969).
60. *See* text accompanying notes 43-46 and 52-55 *supra*.

turned to the states under the twenty-first amendment have been delegated to that body by Pennsylvania's citizens.[61] One of the rights thereby conferred to the P.L.C.B. is the right to engage in interstate commerce of liquor into the state in the same manner as any citizen, which is absolutely identical to the right to engage in the interstate commerce of any other merchandise, except as conditioned by federal law.[62]

Any citizen of the United States has the privilege to bargain for the best price possible on any item purchased, as conditioned by the jurisdiction in which he is conducting his business, and by federal statute.[63] There appears to be no reason to assume that this privilege is less viable when applied to transactions involving alcoholic beverages, inasmuch as the ratification of the twenty-first amendment restored alcohol to parity with other products except as limited by the federal government or by a state within its own borders.[64] Thus, this privilege also passed to the P.L.C.B. permitting it to bargain for the best price possible on all purchases unless restricted by Pennsylvania's own laws or federal statutes.

In order to show that its privilege of purchasing alcoholic beverages at the lowest price possible has been unconstitutionally infringed upon under the privileges and immunities clause of the fourteenth amendment,[65] Pennsylvania need demonstrate only two things:[66] (1) That the purchase of alcoholic beverages at the best price possible, as limited by her own and federal statutes, is a privilege arising out of the nature and essential character of the federal government, granted or secured by the Constitution; and (2) that such privilege has been unreasonably infringed upon. This section of the Comment will discuss the legal proof of these two elements and the probability of success of such an argument, if legally sound.

By its enactment of section 101-b-3,[67] the New York legislature made it impossible for Pennsylvania's Liquor Control Board to purchase liquor at a price lower than that paid by New York wholesalers for the same product.[68] At first glance, the New York statute may appear to have no effect on the rights of Pennsylvania citizens and the P.L.C.B. Closer analysis, however, reveals that there is indeed an encroachment.

Stated generally, Pennsylvania is the largest single purchaser of alcoholic beverages in the world.[69] Based on this fact alone,

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61. *See* text accompanying notes 52-55 *supra*.
62. *See* text accompanying notes 54-59 *supra*.
63. *See* text accompanying notes 203-07 *infra*.
64. *See* text accompanying notes 52-55 *supra*.
65. U.S. CONST. amend. XIV.
66. *See* text accompanying note 81 *infra*.
67. N.Y. ALCO. BEV. CONTROL § 101-b-3 (McKinney Supp. 1964).
68. *See* text accompanying notes 23-37 *supra*.
69. In 1970 the Pennsylvania Liquor Control Board paid $256,323,132 for liquor. The closest competitor was the Alcoholic Beverage Control

it appears logical to expect that the P.L.C.B. would receive substantial quantity discounts based on the substantial economic weight associated with a major consumer. In addition to the sheer volume of purchase are the facts of delivery to only a comparatively few warehouses, standardized order procedures, uniform billing procedures, etc.—all factors which result in a legitimate dollar savings to the distiller in clerical, administrative, labor and transportation costs. When this situation is juxtaposed with that in New York, for example, where orders originate with at least 175 separate wholesalers,[70] the fact of significant savings by sale to one customer becomes obvious.

Thus, because of the New York statute[71] and similar affirmation practices in twenty-six other states,[72] the P.L.C.B. cannot bargain for reduced prices in any form, for even assuming that some reduction were achieved, it must be immediately offered as well to all affirmation states, thus ceasing to be a discount. In so restricting the P.L.C.B., New York is also similarly restricting each Pennsylvania citizen in the exercise of a privilege given to him by the twenty-first amendment—the privilege to purchase alcoholic beverages to the extent permitted by Pennsylvania and federal law. It has been suggested that such restriction constitutes a denial of the privileges and immunities of a citizen of the United States, thus being unconstitutional.[73] The remainder of this section of this Comment will deal with that suggestion.

An initial question to be resolved is whether New York's action is permissible under the twenty-first amendment, thus negating the effect of the privileges and immunities clause under the theory that a restrictive constitutional amendment later in time controls an earlier constitutional guarantee.[74] As discussed

Board of the State of Michigan, which paid $215,643,715 for liquor during the same period. The Distilled Spirits Institute, *Public Revenue from Alocholic Beverages, 1970* (1971). It should be noted that this does not indicate that the largest state market for alcoholic beverages is Pennsylvania. In 1971, California residents consumed 46,656,780 wine gallons of alcoholic beverages and New York 43,332,962 wine gallons, while Pennsylvania residents consumed only 16,187,669 wine gallons. GAVIN-JABSON, THE LIQUOR HANDBOOK 1972 (1972). Because Pennsylvania is a control state, however, only one purchaser was involved whereas New York and California purchases were made by a large number of wholesalers.

70. GAVIN-JABSON, THE LIQUOR HANDBOOK 1971 (1972) at 98. Figure for the fiscal year ending June 30, 1971.

71. N.Y. ALCO. BEV. CONTROL § 101-c-3 (McKinney Supp. 1964).

72. *See* note 15 *supra*.

73. *See* note 5 *supra*.

74. *See* Corneli v. Moore, 267 F. 456 (D.C. Mo.), *aff'd*, 257 U.S. 491 (1920) for a detailed discussion of this interesting and presumedly valid constitutional theory.

above,[75] the twenty-first amendment conferred upon the states plenary power with respect to the sale, consumption, transportation and manufacture of alcoholic beverages.[76] New York apparently can therefore adopt any law or regulation reasonably designed to effectuate an expressed legislative purpose concerning the sale, consumption, transportation and manufacture of alcoholic beverages.[77] However, this plenary power was given to *each* state, thus of necessity containing an inherent restriction that any such statute be limited in effect to the confines of the state enacting it. Thus, for example, Pennsylvania could not declare it to be illegal for one of its citizens to consume alcoholic beverages while in New York state, or to use an even more extreme example, declare it to be illegal for any person to produce alcohol within fifty miles outside of its state borders. In essence, however, that is precisely what New York has done by enacting the affirmation statute.[78] In exercising its right under the twenty-first amendment, New York has placed a direct limitation upon the exercise of identical twenty-first amendment rights by Pennsylvania. Although this effect appears to be clearly improper, it may not constitute a violation of the privileges or immunities clause of the fourteenth amendment.

The fourteenth amendment to the United States Constitution provides, *inter alia,* that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."[79] At the time of its proposal to the legislatures of the states by the Thirty-ninth Congress in June 13, 1866 and ratification on July 21, 1868, the fourteenth amendment and the privileges and immunities clause in particular, was hailed as a major source of new federal guarantees to the citizens of the various states. This concept of the clause was, however, short-lived.[80]

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75. *See* text accompanying notes 52-55 *supra.*

76. Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966).

77. *Id. See also* note 55 *supra.*

78. N.Y. ALCO. BEV. CONTROL § 101-b-3 (McKinney Supp. 1964).

79. U.S. CONST. amend, XIV, § 1. It should be noted that the equal protection clause of the fourteenth amendment, U.S. CONST. amend. XIV, § 1, can have no application to the situation under discussion. The equal protection clause provides that "[N]o State shall . . . deny to any person *within its jurisdiction* the equal protection of the laws." [Emphasis added]. Inasmuch as neither Pennsylvania nor her citizens are persons within New York's jurisdiction, the equal protection clause has no applicability.

80. *See* P. HOWARD, SELECTED ESSAYS ON CONSTITUTIONAL LAW, Book 2 (1938) at 402-24. The aim of the most aggressive sponsors of the clause was to centralize in the hands of the federal government large powers hitherto exercised by the states, with a view of enabling business to develop unimpeded by state interference. This expansive alteration of the federal system was to have been achieved by converting the rights of the citizens of each state into privileges and immunities of United States Citizenship, which privileges were to be protected by the judiciary. The United States Supreme Court noted these facts, and then rejected the concept as not being the intent of Congress or the ratifying states. *Cf.* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

After expressing a reluctance to delineate a definitive enumeration of those privileges and immunities of United States citizens which are protected against state encroachment, the Supreme Court did, in the *Slaughterhouse Cases*,[81] "suggest some [privileges and immunities] which owe their existence to the Federal Government, its National character, its Constitution, or its laws."[82] The Court then identified the following: right of access to the seat of Government, and to the seaports, subtreasuries, land offices, and courts of justice in the several states; right to demand protection of the federal government on the high seas, or abroad; right of assembly and privilege of the writ of habeas corpus; right to use the navigable waters of the United States; and rights secured by treaty.[83]

Another listing was offered thirty-five years later in *Twining v. New Jersey*,[84] where the Court recognized "among the rights and privileges"[85] of national citizenship the following: the right to pass freely from state to state,[86] the right to petition Congress for a redress of grievances,[87] the right to vote for national officers,[88] the right to enter public lands,[89] the right to be protected against violence while in the lawful custody of a United States Marshall,[90] and the right to inform the United States authorities of violations of its laws.[91] In another decision, not referred to in *Twining*, the Court acknowledged that the carrying on of interstate commerce is a "right which every citizen of the United States is entitled to exercise."[92]

During more modern times, this clause has been accorded somewhat uneven treatment by the Court,[93] which has on at least two occasions manifested a disposition to magnify the restraint which it imposes on state action by enlarging previous enumera-

81. 83 U.S. (16 Wall.) 36 (1873).
82. *Id.* at 79.
83. *Id.* at 79-80, *citing* Crandall v. Nevada, 75 U.S. (6 Wall.) 35 (1868), decided before ratification of the fourteenth amendment.
84. 211 U.S. 78 (1908).
85. *Id.* at 97.
86. *Id. citing* Crandall v. Nevada, 75 U.S. (6 Wall.) 35 (1868).
87. *Id. citing* United States v. Cruikshauk, 82 U.S. 542 (1876).
88. *Id. citing Ex Parte* Yarborough, 110 U.S. 651 (1884); Wiley v. Sinkler, 179 U.S. 58 (1900).
89. *Id. citing* United States v. Waddell, 112 U.S. 76 (1884).
90. *Id. citing* Logan v. United States, 144 U.S. 263 (1892).
91. *Id. citing In re* Quarles and Butler, 158 U.S. 532 (1895).
92. Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).
93. *See* P.B. Kirkland, *The Privileges or Immunities Clause: "It's Hour Come Round at Last"?*, 1972 WASH. U. L.Q. 405 (1972).

tions of the privileges protected thereby. In *Hague v. C.I.O.*,[94] the Court held that freedom to use municipal streets and parks for the dissemination of information concerning provisions of a federal statute and to assemble peacefully therein for discussion of the advantages and opportunities offered by the act were the privileges and immunities of a United States citizen. The latter privilege was deemed to have been abridged by city officials who acted in pursuance of a void ordinance which authorized a director of safety to refuse permits for parades or assemblies on streets or parks whenever he believed riots could thereby be avoided and who forcibly evicted therefrom city union organizers who sought to use the streets and parks for the aforementioned purposes.[95] Again in *Edwards v. California*,[96] four Justices, who concurred in the judgment that a California statute restricting the entry of indigent migrants was unconstitutional, preferred to rest their decision on the ground that the act interfered with the rights of citizens to move freely from state to state.[97] In thus rejecting the commerce clause relied on by the majority as the basis for disposing of this case, the minority resurrected an issue first advanced in the old decision of *Crandall v. Nevada*[98] and believed to have been resolved in favor of the commerce clause by *Hilson v. Kentucky*.[99]

Colgate v. Harvey,[100] however, which was decided in 1935 and overruled in 1940,[101] represented the first attempt by the court since adoption of the fourteenth amendment to convert the privileges and immunities clause into a source of protection for other than those "interests growing out of the relationship between the citizen and the natural government."[102] Here the Court declared that the right of a citizen, resident in one state, to contract in another, to transact any lawful business, or to make a loan of money, in any state other than that in which the citizen resides was a privilege of national citizenship which was abridged by a state income tax law excluding from taxable income interest received on money loaned with the state.[103]

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94. 307 U.S. 496 (1939).
95. Concurring in the result, Mr. Justice Stone argued that the case should have been disposed of by relying upon the due process clause, rather than the privileges and immunities clause inasmuch as the record disclosed that the complainants had not invoked the latter clause and the evidence failed to indicate that any of the complainants were in fact United States citizens or that any relation between citizens and the federal government was involved. Hague v. C.I.O., 307 U.S. 496, 525-27 (1939) (concurring opinion).
96. 314 U.S. 160 (1941).
97. *Id.* at 177-83 (Douglas, Black, Murphy and Jackson, JJ, concurring).
98. 75 U.S. (6 Wall.) 35 (1868).
99. 279 U.S. 245, 251 (1929).
100. 296 U.S. 404 (1935).
101. *See* Madden v. Kentucky, 309 U.S. 83 (1940).
102. Colgate v. Harvey, 296 U.S. 404, 444 (1935).
103. *Id.* at 445-46.

Whether or not this repudiated concept is again to be revived and the privileges and immunities clause again placed in readiness for further expansion cannot yet be determined with assurance.[104] However, in *Oyama v. California*[105] the Court, in a single sentence, affirmed the contention of a native-born youth, that California's Alien Land Law as applied to him deprived him "of his privileges as an American citizen, in that it worked a forfeiture of property purchased in his name with funds advanced by his parent, who was a Japanese alien ineligible for citizenship and precluded from owning land by the terms of the statute.[106]

In 1963 the Supreme Court again considered a privileges and immunities argument in *Head v. New Mexico Board of Examiners in Optometry*.[107] Petitioner here claimed that a New Mexico statute which forbade the advertising of eyeglass prices and thereby prohibited her newspaper from dealing with a Texas optometrist, violated her privileges and immunities of national citizenship. The Court disposed of this argument in a footnote, stating that "the Privileges and Immunities clause of the Fourteenth Amendment does not create a naked right to conduct a business free of otherwise valid state regulation."[108]

In 1969, the Court in *Shuttlesworth v. City of Birmingham*[109] was given an opportunity to clarify the position stated in *Hague v. C.I.O.*[110] some thirty years earlier. In that case, very similar on its facts to *Hague*, the defendant was convicted of violating a city ordinance making it illegal to participate in any parade, procession, or other public demonstration without first obtaining a permit from the city commission. The Court reaffirmed *Hague*, quoting at length therefrom: "Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. . . ."[111] The Court concluded that although the right could be state regulated, it could not be abused without violating those privileges and immunities.[112] Thus in revitalizing the long-dormant and beclouded *Hague* doctrine, the Court appears to have firmly committed itself to employing the

104. *See* P.B. Kirkland, *The Privileges or Immunities Clause: "It's Hour Come Round at Last"?* 1972 WASH. U. L.Q. 405 (1972).
105. 332 U.S. 633 (1948).
106. *Id.* at 640.
107. 374 U.S. 424 (1963).
108. *Id.* at 432 n.12.
109. 394 U.S. 147 (1969).
110. 307 U.S. 496 (1939).
111. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969).
112. *Id.*

privileges and immunities clause as a means of insuring at least first amendment rights to the general citizenry, perhaps portending a more active future role for that clause.

The Court's most recent consideration of the privileges and immunities clause came in 1971 in *James v. Valtierra.*[113] There petitioners challenged a California constitutional[114] provision requiring community referendum approval prior to the building of low cost housing, asserting that the provisions denied them their right to federally-funded low cost housing, a right protected, *inter alia*, by the privileges and immunities clause. The Court disposed of the contention in one sentence, stating simply that "We also find the privileges and immunities argument without merit."[115]

Federal and Supreme Court decisions regarding alcoholic beverages have never upheld a privileges and immunities argument. The most recent such case arose in 1963. That case, *American Travelers Club, Inc. v. Hostetter,*[116] decided by a New York District Court, involved a New York Liquor Authority bulletin which in effect precluded plaintiff from conducting a rather complicated business whereby liquor orders mailed from outside the United States were solicited, filled in Holland, declared by returning American tourists as "following baggage," and delivered to them in New York. The Court found no violation of the privileges and immunities clause.

Prior to prohibition, the Supreme Court considered state limitation on the sale of alcoholic beverages on several occasions. In each instance, after reviewing the *Slaughterhouse* limitation that only privileges and immunities arising out of the nature and essential character of the national government and granted or secured by the Constitution of the United States fall within the protection of the clause,[117] the Court found the right to sell alcoholic beverages to fall outside the sphere of such protection.[118] It should, however, be noted that in each instance the limitation effected only activity within the confines of the state.[119] State courts have unanimously arrived at similar conclusions regarding the sale of alcoholic beverages.[120]

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113. 402 U.S. 137 (1971).
114. CAL. CONST. Art. XXXIV.
115. James v. Valtierra, 402 U.S. 137, 140 (1971).
116. 219 F. Supp. 95 (D.C.N.Y. 1963).
117. Giozza v. Tiernan, 148 U.S. 661 (1893); Crowley v. Christensen, 137 U.S. 91 (1890); Mulger v. Kansas, 123 U.S. 657 (1887); Bartemeyer v. Iowa, 18 Wall. 138 (1874); Busch v. Webb, 122 F. 655 (C.C. Tex. 1903), *appeal dismissed,* 194 U.S. 640 (1903).
118. *Id.*
119. *Id.*
120. Sepe v. Daneker, 76 R.I. 160, 68 A.2d 101 (1949); Silberglied v. Mulrooney, 150 Misc. 251, 270 N.Y.S. 290 (1934). *See also* Wylie v. State

IV. Conclusion as to Privileges and Immunities

In light of the historical application of the privileges and immunities clause, especially as applied to liquor, it appears unlikely that any future affirmation argument by Pennsylvania based thereon will receive more than cursory treatment by the United States Supreme Court. A possibility of success does, however, exist, especially in light of two factors. The first and probably less important of these is the possibility of an expanded role being judicially assigned to the historically all-but-ignored privileges worthy of note in the 1948 decision that the right to hold property falls within the privileges and immunities clause.[121] Also the Court's 1969 reaffirmation of the long dormant *Hague* rationale, employing the privileges and immunities clause as a vehicle for extending certain first amendment rights to override conflicting state law may portend such an extension.[122]

Even if the Court is unwilling to so extend the doctrine, however, solid ground appears to exist for a favorable decision. The controlling criterion for the application of the privileges and immunities clause still appears to be that the interest asserted be a privilege or immunity arising out of the nature and essential character of the national government and granted or secured by the Constitution of the United States.[123] According to this language, Pennsylvania need show only two things to invoke the protection of the privileges and immunities clause: (1) That the purchase of alcoholic beverages at the best price possible, as limited by her own and federal statutes, is a privilege arising out of the nature and essential character of the federal government, granted or secured by the Constitution; and (2) that such privilege has been unreasonably infringed upon.

As to the first requirement, the argument is complex but apparently logically sound. Initially, although the privilege of purchasing alcoholic beverages may not have originally been a federal guarantee, revocation of that privilege and subsequent restoration through the medium of constitutional amendment apparently raised it to the level of a constitutional guarantee of each United States citizen *as limited by the state within whose jurisdiction he*

Bd. of Equalization, 21 F. Supp. 604 (D.C. Cal. 1938); Marks v. Bruckman, 170 Misc. 709, 9 N.Y.S. 947 (1937); Utah Mfrs.' Ass'n v. Stewart, 82 Utah 198, 23 P.2d 229 (1933); Beacon Liquors v. Martin, 279 Ky. 468, 151 S.W.2d 446 (1929); McClure v. Topf, 112 Ark. 342, 166 S.W. 174 (1914).

121. Oyama v. California, 332 U.S. 633 (1948).

122 Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969). *See* text accompanying notes 94-95 and 109-12 *supra.*

123. *Compare* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873) *with* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

stands. Thus, the constitutionally guaranteed privilege may vary from absolute freedom to absolute prohibition as the citizen passes from jurisdiction to jurisdiction, but the constitution guarantees that the federal government will enforce the degree of freedom or restraint chosen by each state.[124] Second a citizen of the United States has the privilege of seeking and receiving the lowest price on any item purchased that is permissible under federal law and the law of the state wherein he stands.[125] Pennsylvania citizens have delegated this privilege as to liquor purchases to the Pennsylvania Liquor Control Board.[126] The first requirement for invoking the protection of the privileges and immunities clause is thus met.

Fulfilling the second requirement is relatively simple. Pennsylvania need only point to the New York affirmation statute itself, which prohibits her from obtaining liquor at a price lower than that received by New York, and then demonstrate that due to reduced costs on the part of the manufacturer, quantity discounts would be forthcoming but for the New York restriction.[127] The final element to be pointed out is that, although New York has the absolute privilege to condition the sale of alcoholic beverages within her own jurisdiction as she sees fit, when the effect of exercising that privilege is to infringe upon the exercise by Pennsylvania of an identical privilege, an unreasonable encroachment results.[128]

Despite the apparent logical soundness of this argument, however, probabilities of future success seem small. To achieve acceptance, Pennsylvania would have to persuade the United States Supreme Court to extend recognition to a portion of the Constitution which, although apparently properly applicable, has certainly not been a favorite with the Court. There appears little to indicate that the Court considers this point in history to be a proper time for such extension.

V. The Conflict Between the Commerce Clause and the Twenty-First Amendment

The extent to which the twenty-first amendment overrides the federal government powers granted by the commerce clause is the primary consideration in the determination of whether affirmation agreements are constitutional. The commerce clause empowers the federal government to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[129] Because affirmation agreements place restrictions on

124. *See* text accompanying notes 43-61 *supra.*
125. *See* text accompanying note 63 *supra.*
126. *See* text accompanying notes 60-62 *supra.*
127. *See* text accompanying notes 67-73 *supra.*
128. *See* text accompanying notes 74-78 *supra.*
129. U.S. Const. art. 1, § 8, cl. 3.

the sale of alcoholic beverages, it is necessary to consider the extent of a state's power over liquor in light of the commerce clause.

The first case is to consider the conflict between the twenty-first amendment and the commerce clause was *State Board of Equalization v. Young's Market Co.*[130] In that case a five-hundred dollar license fee to import beer imposed by California was under consideration. Since this fee obviously offended the freedom of interstate commerce in beer,[131] the twenty-first amendment and the commerce clause conflicted. The Court addressed this conflict by finding:

> The Amendment which "prohibited" the transportation or importation of intoxicating liquors into any state "in violation of the laws," abrogated the right to import free, so far as concerns intoxicating liquors.[132]

All subsequent cases concerning restrictions placed on the sale or use of intoxicants strictly within the specific state's borders have been upheld. The twenty-first amendment has been used to uphold a state regulation forcing registration of imported liquor with the United States Patent Office,[133] a statute forbidding in-state beer distributors from purchasing beer from any state which discriminates against home state manufacturers,[134] a state statute limiting transportation of intoxicating liquors to common carriers,[135] a state statute imposing minimum prices on retailers,[136] a prohibition against citizens of other states from transporting liquor through the state in question,[137] a prohibition against soliciting liquor sales in-state by unlicensed nonresidents[138] and finally a state statute prohibiting female bartenders in certain areas.[139]

The foregoing cases all involve intrastate controls. The twenty-first amendment by its own terms is limited in applicability

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130. 299 U.S. 59 (1936).

131. What the plaintiffs complain of is the refusal to let them import beer without paying for the privilege of importation. Prior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce. . . .

Id. at 62.

132. *Id.*

133. Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938).

134. Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939).

135. Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939).

136. Schwartz v. Kelly, 140 Conn. 177, 99 A.2d 89 (1953).

137. Wylie v. State Bd. of Equalization, 21 F. Supp. 694 (S.D. Cal. 1937).

138. House of York LTD. v. Reng, 322 F. Supp. 530 (S.D.N.Y. 1970).

139. Krauss v. Sacramento Inn, 314 F. Supp. 171 (C.D. Cal. 1970).

to such circumstances.[140] Because affirmation statutes involve intrastate controls over intoxicating liquors with interstate effects, it is necessary to examine cases in which the courts have determined that the powers granted by the twenty-first amendment have been exceeded.

A. *Limitations on State Twenty-first Amendment Powers*

In *Hostetter v. Idlewild*,[141] the state of New York attempted to have defendant's practice of purchasing liquor outside New York for sale to international travelers at Idlewild Airport declared illegal. The Supreme Court in defining New York's twenty-first amendment power held:

> This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.[142]

Concluding that these circumstances do not involve "intoxicants destined for use, distribution, or consumption within its borders," the Court indicated:

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.[143]

Other circumstances in which the courts have found that state controls over liquor are not sanctioned by the twenty-first amendment because of extraterritorial effects include the following: state attempts to prevent the shipment of liquor through its territory for consumption in a national park located therein;[144] an attempt by New Jersey to impose its liquor licensing requirements upon owners of liquor contained in vessels docked at New Jersey ports;[145] and an attempt to place restrictions on liquor being shipped through a state.[146]

The above cases in which the commerce clause was given application in spite of the twenty-first amendment all involved circumstances of attempted liquor control where the liquor involved

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140. The twenty-first amendment is limited in applicability to situations in which the intoxicating liquor is "delivered or used" in the state. *See* text accompanying notes 144-46 *infra*.

141. 377 U.S. 324 (1964).

142. *Id.* at 330.

143. *Id.* at 332.

144. Collins v. Yosemite Park Co., 304 U.S. 518 (1939).

145. Epstein v. Lordi, 261 F. Supp. 921 (D.C.N.J. 1966). *See also* Department of Revenue v. James B. Beam Distillery Co., 377 U.S. 341 (1964) in which the Supreme Court found that a state had no power under the twenty-first amendment to impose an import tax on liquor in sealed containers prior to resale or use by the importers in the state.

146. Carter v. Virginia, 321 U.S. 131 (1944); Motor Cargo v. Division of Tax Appeals, 10 N.J. 585, 92 A.2d 774 (1952).

was not for "delivery or use therein."[147] The affirmation statutes here under consideration regulate liquor for delivery or use in the state imposing the restriction. However, the restriction, it is contended, has extraterritorial effects. Thus, when New York passes its affirmation statute it effectively prohibits the state of Pennsylvania from bargaining for quantity purchase price discounts. It is clear that the twenty-first amendment cannot be applied to sanction state controls over liquor for use outside its borders.[148] Based on this finding, it is submitted that any state liquor controls, in this case affirmation laws, which effectively regulate the price at which liquor can be purchased by other states exceeds twenty-first amendment powers.

Several Supreme Court decisions imply that any use of twenty-first amendment powers having effect outside state borders fall because of the commerce clause. In *United States v. Frankfort Distilleries*,[149] producers, wholesalers and retailers of liquor were indicted under the Sherman Act for alleged price fixing of liquor. When the defendants argued that the twenty-first amendment prevented interference by the federal government the Supreme Court responded:

> It is argued that the Twenty-first Amendment to the Constitution bars this prosecution. That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories. It has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries.[150]

This holding is surprising for several reasons. First, it recognizes that price fixing within a state has interstate effects. Second it recognizes that the states have the power to regulate the conduct of persons doing an interstate business although this state power is not to the exclusion of federal control over interstate commerce.

Several other cases have also recognized the right of the federal government, through use of the commerce clause, to prohibit price conspiracies in the sale of intoxicating liquors.[151] However,

147. *See* note 140 *supra.*
148. *See* notes 144-46 and accompanying text *supra.*
149. 324 U.S. 293 (1945).
150. *Id.* at 299.
151. *See* Washington Brewers Institute v. United States, 137 F.2d 964 (9th Cir. 1943); Chapiewsky v. 6 Heileman Brewing Co., 297 F. Supp. 33 (W.D. Wis. 1968); Schenley Industries, Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n., 272 F. Supp. 872 (D.C.N.J. 1967); United States v. Maryland State Licensed Beverage Ass'n., 138 F. Supp. 685 (D.C. Md.

where the state itself has adopted the price fixing policy under scrutiny the twenty-first amendment prevents federal government intervention. Thus, in *Schenley Industries, Inc. v. New Jersey Wine and Spirit Wholesalers Association,*[152] when an outside manufacturer contested price fixing by New Jersey manufacturers the court found: "[u]nless a State has affirmatively adopted a policy of price fixing by private groups, such action is not protected by the twenty-first amendment."[153] This holding indicates that in spite of the interstate effect of price fixing, where the state authorizes such fixed prices the action is within twenty-first amendment powers.[154]

Interstate effects of the exercise of a twenty-first amendment power are not alone sufficient to invalidate a use of that power. In two cases[155] the courts have been faced with the question of whether affirmation laws affect interstate commerce to *such an extent* that they fall outside powers given the states over intoxicating liquors by the twenty-first amendment. Both cases involved the potential effect of affirmation laws on liquor prices in other states. The argument raised in these two cases was that since manufacturers were presently obtaining minimum profits in New York and Kansas there was no possibility of lowering prices in these states to comply with the affirmation law which requires that New York and Kansas wholesalers be given the lowest price charged anywhere in the country. The manufacturers, Seagrams and Laird, argued that the lower prices received in certain other states were the result of lower selling, clerical and transportation expenses there, which resulted from the fact that the state itself is the purchaser in these states. Thus, there is only one shipment point, one sale to consummate, one bill to type up and no collection problem. To comply with these affirmation laws the manufacturers argued that liquor prices would of necessity be raised in these other states rather than lowered in New York or Kansas. Finally, these manufacturers argued that this form of interstate interference, unlike state price fixing, has substantial effects on interstate commerce and is therefore unprotected by the twenty-first amendment.

In considering this unique argument of interference with interstate commerce the Supreme Court in *Joseph E. Seagrams & Sons v. Hostetter* stated:

> We need not now decide whether the mode of liquor regulation chosen by a state in such circumstances could ever constitute so grave an interference with a company's op-

1956); United States v. Colorado Wholesale Wine & Liquor Dealers Ass'n. 47 F. Supp. 160 (D.C. Colo. 1942).

152. 272 F. Supp. 872 (D.C.N.J. 1967).

153. *Id.* at 879.

154. *See* notes 133-40 and accompanying text *supra.*

155. Joseph E. Seagrams & Sons v. Hostetter, 384 U.S. 35 (1966); Laird & Co. v. J.R. Cheney, 196 Kan. 675, 414 P.2d 18 (1966).

> erations elsewhere as to make the regulation invalid under the Commerce Clause.[156]

The Court felt that whether such discrimination would result was pure conjecture subject to review at a later date. The Court found:

> The serious discriminatory effects of § 9 alleged by appellants on their business outside New York are largely matters of conjecture. It is by no means clear, for instance, that § 9 must inevitably produce higher prices in other states, as claimed by appellants, rather than the lower prices sought for New York. It will be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly presents them.[157]

This case is therefore extremely significant since it recognized that affirmation laws, if sufficient factual support is presented, might amount to excessive use of twenty-first amendment powers. It also envisions the possibility that, although "affirmation laws" appear to be intrastate in effect and hence within the protection of the twenty-first amendment, such laws could be in violation of the commerce clause. It is clear that proof of a *significant* interference with liquor prices in other states would result in the invalidation of both New York's and Kansas' affirmation laws.

However, neither of these cases present criteria for determining what constitutes a sufficient interference with interstate commerce. If we presume that some interference with interstate commerce can be shown to have resulted from the New York and Kansas affirmation laws, we can then examine the commerce clause and the case law interpreting what acts are sufficient to constitute a violation thereof. In considering any state law which indirectly affects the commerce of the country, it must be remembered that the commerce clause was not intended to prevent the states from passing such legislation if in the interest of the health, life or safety of their citizens.[158] State statutes for the protection of state citizens and indirectly affecting interstate commerce are especially prevalent in the field of transportation. Thus, a South Carolina statute limiting the weight and width of vehicles using its highways clearly interfered with interstate commerce, yet the Supreme Court upheld it. The Court indicated:

> In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adopted to promote safety upon its highways and the conservation of their use, ap-

156. 384 U.S. at 42-43.
157. *Id.* at 45.
158. Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960). *See also* Hoopstein Co. v. Cullen, 318 U.S. 313 (1943).

> plicable alike to vehicles moving in interstate commerce and those of its own citizens.[159]

This power to interfere with interstate commerce in the interest of protecting citizenry, however, is not without limits. In *Bibb v. Navajo Freight Lines*,[160] an Illinois statute required special rear fender mud guards on trucks traveling on its highways. The statute was struck down by the Supreme Court which declared: "This is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce."[161]

Although the twenty-first amendment was drafted in a manner which enabled the states to maintain maximum control over liquor due to the adverse effects alcohol can cause, it would be difficult to argue that affirmation laws are passed with any intention of protecting the health or safety of state citizens. Such a purpose would be an effective defense to any charge of interference with interstate commerce but no such defense exists. The sole purpose of affirmation laws is to decrease the price paid for liquor by state wholesalers and retailers thus reducing consumer prices and making liquor more easily obtainable. Accomplishment of this purpose increases rather than decreases the dangers inherent in liquor.

A second consideration of whether an affirmation law violates the commerce clause is the extent to which it interferes with interstate commerce. In *California v. Thompson*,[162] the validity of a California statute requiring transportation agents engaged in business in California to post a bond and obtain a license to conduct this business was upheld. The Supreme Court presented the following criteria in considering the legality of a state statute which interferes with interstate commerce:

> As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power even though the regulation affects interstate commerce. . . . Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause.[163]

This case can be distinguished from the affirmation law action in that the California statute was for the protection of its citizens

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159. South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 189 (1938), *quoting* Morris v. Duby, 274 U.S. 135, 143 (1927).
160. 359 U.S. 520 (1959).
161. *Id.* at 529.
162. 313 U.S. 109 (1941).
163. *Id.* at 113.

whereas the affirmation statutes are not. However, there are also similarities. Both the California statute and affirmation statutes regulate matters of local concern. Also, it could be argued that an affirmation statute is for the protection of citizens, its purpose being to enable citizens to obtain decreased liquor prices. The test which is established in *California v. Thompson,* assuming the flow of liquor is not a matter of national concern, is whether the barrier imposed *materially* affects the free flow of commerce. Whether or not the affirmation statutes materially affect the free flow of liquor is a subjective test to be applied to the price information supplied.

Of final consideration is the purpose of affirmation laws—economic benefit to the state passing the law. In *Hood & Sons v. Du Mond,*[164] a distributor of milk located in Massachusetts and operating three receiving plants in New York applied for a license for an additional New York plant. New York rejected the application contending the new plant would reduce the supply of milk from local markets. Regarding an interference with interstate commerce for state economic benefit, the Court held:

> This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles in commerce, either into or out of the state while generally supporting their right to impose even burdensome regulations in the interest of local health and safety.[165]

On the specific question of promoting economic benefits within the state, the Court in *Hood & Sons v. Du Mond* held "that the State may not promote its own economic advantages by curtailment or burdening of interstate commerce."[166] Since the affirmation statutes are enacted for state economic benefit and since there is no defense that these statutes are passed in the interest of health and safety of citizens, it is submitted that they are in violation of the commerce clause. If sufficient interference with interstate commerce is shown, the twenty-first amendment is inapplicable since the state has exceeded its powers. Therefore, a state statute, the affirmation law, is in conflict with a federal constitutional provision, the commerce clause. Where such conflicts arise the supremacy clause[167] is applied. The result is that the state

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164. 336 U.S. 525 (1949).
165. *Id.* at 535. *See also* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).
166. 336 U.S. at 532.
167. U.S. CONST. art. VI, cl. 2:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the

legislation is struck down as unconstitutional.[168]

VI. ARGUABLE ATTACKS ON AFFIRMATION UNDER THE SHERMAN ACT

Another possibility of action by the state of Pennsylvania against other affirmation states exists in use of the Sherman Act which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal. . . .[169]
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States. . . .[170]

A. *State Action as a Violation of the Sherman Act*

Before considering the manner in which the affirmation states may have violated the Sherman Act, it is necessary to examine whether the Act may be applied against state actions. In determining whether a state may be found in violation of the Sherman Act, one must also consider the effect of the twenty-first amendment which grants to the states broad regulatory powers. In *Washington Brewers Institute v. United States,*[171] the court, considering the applicability of the Sherman Act to the liquor industry in light of the twenty-first amendment, indicated:

> Thus the broad theory of the Sherman Act—that trade should be free of artificial restraints—is in many respects incompatible with the policy of state liquor-control legislation; and wherever such conflicts exist the Sherman Act must give way, just as the commerce clause itself gives way in identical circumstances.[172]

Thus, the point of inquiry turns to the circumstances under which the commerce clause overrides the twenty-first amendment.[173] In *Beckanstin v. Liquor Control Commission,*[174] the Connecticut Supreme Court held that state legislation directing wholesalers to fix and maintain prices to retailers of liquor which had been transported in interstate commerce was within the powers granted by the twenty-first amendment and not subject to Sherman Act restrictions.

Supreme Law of the Land; and the Judges in every state should be bound thereby, and nothing in the Constitution or Laws of any State to the contrary notwithstanding.

168. *See* Baldwin v. Seelig, 294 U.S. 511 (1935); Buck v. KyKendall, 267 U.S. 307 (1925).
169. 15 U.S.C. § 1 (1961).
170. 15 U.S.C. § 2 (1961).
171. 137 F.2d 964 (9th Cir. 1943).
172. *Id.* at 968.
173. *See* notes 140-47 and accompanying text *supra.*
174. 140 Conn. 185, 99 A.2d 119 (1953).

The case of *Chapiewsky v. G. Heilman Brewing Co.*[175] held that the Sherman Act could be applicable to transactions involving liquor. The court there indicated:

> It is well established, however, that the Sherman Act is not limited to transactions in interstate commerce, but extends to intrastate transactions, which affect interstate commerce.[176]

Chapiewsky is significant because it applied the Sherman Act to an interstate pricing arrangement between distributors and a brewer of beer. However, since the case did not concern a *state regulation,* no conflict arose between the twenty-first amendment and the Sherman Act. *United States v. Colorado Wholesaler Wine and Liquor Dealers Association*,[177] presenting a factual situation similar to that dealt with in *Chapiewsky*, involved a conspiracy to set prices in the state of Colorado. Although again there was no direct conflict between the twenty-first amendment and the Sherman Act, the language used by the court implied that the Sherman Act would prevail:

> We cannot agree that by the 21st Amendment to the Constitution liquor was removed from interstate commerce, or that jurisdiction over it was thereby vested exclusively in the several states, nor that the said Amendment gave the individual states control over intoxicating liquor within their respective borders, with supreme jurisdiction to regulate or limit the sale thereof, without violating the Commerce Clause of the Federal Constitution and the Sherman Act.[178]

This quote, however, must be read in light of the facts of the case. The price conspirators had alleged in defense that the twenty-first amendment prevented intervention of the federal government through use of the commerce clause. The court would not permit such a defense to the Sherman Act. Whether the court intended to place the commerce clause in a position superior to the twenty-first amendment is uncertain. However, *Joseph E. Seagrams & Sons v. Hostetter*[179] involved an action by several liquor manufacturers against New York's affirmation statute. Although violation of the Sherman Act was contended by the appellants, the argument was rejected. However, the Court indicated that "[n]othing in the Twenty-first Amendment, of course would prevent enforcement of the Sherman Act against such a conspiracy."[180] In a cir-

175. 297 F. Supp. 33 (W.D. Wis. 1968).
176. *Id.* at 37.
177. 47 F. Supp. 160 (D.C. Colo. 1942).
178. *Id.* at 162.
179. 384 U.S. 35 (1960).
180. *Id.* at 46.

cumstance of sufficient factual proof the twenty-first amendment does not bar a suit under the Sherman Act against a state's affirmation law if the *Hostetter* holding is followed.

The next consideration is whether Pennsylvania has standing to bring such a suit. To maintain such an action there must be some reasonable basis upon which Pennsylvania can claim direct or indirect harm resulting from another state's affirmation policy. This reasonable basis could be any of the following: the New York statute operates as a restraint of trade preventing Pennsylvania from bargaining for quantity price discounts; the New York statute imposes an artificial barrier upon potential competitors effectively preventing competitive price discounts; New York is part of a combination which through data dissemination intended to and has restrained trade; and finally New York is part of price fixing combinations.

B. *Affirmation Agreements Resulting in a Combination within the Meaning of the Sherman Act*

A factual analysis of the operation of affirmation in the liquor industry is essential to an evaluation of whether affirmation agreements constitute combinations which result in trade restraints. As previously indicated affirmation agreements require manufacturers to guarantee that the price a state is paying for its liquor is the lowest price charged anywhere in the country. In order to assure conformance with affirmation requirements the National Alcoholic Beverage Control Association [N.A.B.C.A.] was formed. N.A.B.C.A. distributes price information to all the member states (consisting of the affirmation states). The liquor manufacturers are "associate members" of the Association and provide the Association with required price information. For purposes of analysis of potential Sherman Act violations, it will be assumed that it can be proven that these liquor manufacturers, through the Association, acquire current price information of all other manufacturers through the N.A.B.C.A.

Whether the exchange of such price information constitutes a Sherman Act violation by the manufacturers will now be considered. The earliest Supreme Court case involving distributions of trade information was *American Column & Lumber Co. v. United States.*[181] In this case the members of a lumber manufacturing association exchanged detailed information concerning sales, inventory, views of the market, and prices charged in recent prior sales. The Court found, in the detailed information disseminated, a purpose of procuring harmonious individual actions. Although no specific agreement of price fixing existed the Court found an implied agreement in the information exchanged and held the members guilty of restraining interstate commerce. In *United States v.*

181. 257 U.S. 377 (1921).

American Linseed Oil Co.,[182] there was again a system for the dissemination of intimate business information through a central agency to all members. Schedules of prices and terms of sale were among the data supplied. The Court found this information was clearly aimed at discouraging independent decision by trade rivals. It should be emphasized that in both *American Column* and *Linseed Oil* the Court looked to the anti-competitive results of exchanging information in finding Sherman Act violations.

In *Maple Flooring Manufacturers Association v. United States*,[183] an association gathered and distributed statistical information among its members. The Court emphasized that "it is neither alleged nor proved that there was any agreement among the members of the association either affecting production, fixing prices or for price maintenance."[184] The Court went on to point out that the evidence failed to establish the maintenance of price uniformity. Rejecting the notion that dissemination of information between competitors is a per se violation of the Sherman Act, the Court held:

> Whether, however, their general purpose was to become law-abiding members of the community or law breakers, it is not, we think, very material unless the court either can infer from the course of conduct a specific and continuing purpose or agreement or understanding on their part to do acts tending to effect an actual restraint of commerce, . . . or unless, on the other hand it is established that the combination entered into by the defendants in the organization of the defendant Association, and its activities as now carried on, must necessarily result in such restraint.[185]

The Court found no violation since there was no inference of an intent to restrain nor any indication that the dissemination must result in such a restraint; nor could the court find any evil in the mere dissemination of information. In fact, the Court indicated that "[c]ompetition does not become less free merely because the conduct of commercial operation becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction."[186] The practice of dissemination of business information with no indication of an intent

182. 262 U.S. 371 (1923).
183. 268 U.S. 563 (1925).
184. *Id.* at 567.
185. *Id.* at 577. *See also* United States v. United States Steel Corp., 251 U.S. 417 (1920).
186. *Id.* at 583. The primary distinguishing factors between the *Maple Flooring* and *American Column* cases lies in the fact that the latter dealt with dissemination of specific price information and an element of coercion whereas the former case contained neither of these criteria.

to restrain commerce through improper use of the information was felt to be a sound and worthwhile business practice.

Since the *Maple Flooring* case, the Supreme Court and the federal district and circuit courts have placed limitations on the "valid business purpose" defense in data dissemination cases. In *Sugar Institute v. United States,*[187] several sugar refiners formed an association which established a price reporting plan. When one seller announced an increase, buyers were given a short waiting period during which they could purchase sugar at the former price. If other sellers failed to follow with their own increases the leader was forced to rescind since sugar is a completely standardized commodity. The Court found a Sherman Act violation not because of any concert to maintain a particular price, but rather because of an agreement which the members entered into that: "All discriminations between customers should be abolished. To that end, sugar should be sold only upon open prices and terms publicly announced."[188] Once a price was accepted by all sellers, thereafter none had the right to deviate from it. The defendants attempted to defend their position using the good business purpose argument. "Having adopted the principle of open prices and terms, without discrimination among customers, as the means of remedying the evils of the secret concession system, the defendants lived up to the principle."[189] The defendants thereby argued that these price controls were in the best interests of all concerned. To this argument the Court responded:

> [T]he number of price changes for refined as compared to raw sugar had been relatively less since the Institute than before. This was "too marked to be explained by the drop in raw prices." There was a "marked increase in margin and a substantial increase in profits" despite a concededly large excess capacity.[190]

The Court, by looking to the effects, rejected the business purpose argument for disseminating information.

The most recent Supreme Court decision concerning the application of the Sherman Act to price dissemination among competitors is *United States v. Container Corporation of America.*[191] In this case there was no *agreement* to adhere to a price schedule as existed in *Sugar Institute v. United States.* All that was present was a request of each defendant for its most recent price charged whenever such information was needed and was not available from another source. The *Container Corporation* case can also be distinguished from the *American Column* and *American Linseed Oil* cases since in those cases detailed reports of business information were furnished to all competitors, whereas here only information

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187. 297 U.S. 553 (1936).
188. *Id.* at 579.
189. *Id.* at 582.
190. *Id.* at 583.
191. 393 U.S. 333 (1969).

from a specific competitor regarding specific sales was exchanged. Evidence elicited during the case showed that "[t]he result of this reciprocal exchange of prices was to stabilize prices though at a downward level. Knowledge of a competitor's price usually meant matching that price."[192] It is important to recognize that the majority based its decision on an actual finding of price stabilization, since this implies that the Supreme Court is not willing to conclude that price data dissemination itself is unlawful per se.

Lower federal courts have tended more toward finding per se violations of the Sherman Act for data dissemination than has the Supreme Court. Thus in *Plymouth Dealers Association v. United States,*[193] it was held that the act of an automobile dealer association in printing and publishing a price list and circulating it among its members violated the Sherman Act. The association contended that mere data dissemination without more cannot constitute a Sherman Act violation. Rejecting this argument, the court stated:

> [O]nce the agreement to fix a price is made, it is conclusively presumed that a conspiracy to restrain trade exists, and it is immaterial whether the agreements were ever actually carried out, whether the purpose of the conspiracy was accomplished in whole or in part, or whether an effort was made to carry out the object of the conspiracy into effect.[194]

This result is really in conformance with Supreme Court statements on the subject that if an agreement to fix prices can be found there is a per se violation of the Sherman Act.[195] But it must be remembered that data dissemination cases can never be truly per se violations since in a data dissemination case the dissemination must be shown to constitute a conspiracy or agreement to fix prices.

In *United States v. Utah Pharmaceutical Association,*[196] it was held that a pharmaceutical association was engaged in a conspiracy to fix prices in unreasonable restraint of interstate commerce, when its officers and directors distributed a price schedule for prescription drugs. Members were induced to use the schedule though no agreement existed. It should be noted that the court

192. *Id.* at 336-37. The court indicated that the mere limitation of price competition resulting from the agreement was sufficient to constitute a Sherman Act violation since it was held in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) that any interference with the setting of price through free market forces is unlawful per se.

193. 279 F.2d 128 (9th Cir. 1960).

194. *Id.* at 132. *See also* Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir. 1962).

195. *See* text accompanying notes 184-88 *supra.*

196. 201 F. Supp. 29 (D.C. Utah), *appeal dismissed,* 306 F.2d 493, *aff'd,* 371 U.S. 24 (1962).

made a definite finding that the price lists were distributed with the intent of inducing association members to conform to the suggested prices. The court added that "with such adoption, publication and distribution shown, no proof would be necessary if an intent to fix prices or an agreement to adhere thereto"[197] was established.

All the data dissemination cases examined required something in addition to mere dissemination to prove a Sherman Act violation. Some of the cases found actual market price stabilization effects[198] sufficient, whereas others based the violation on a finding of an actual agreement or intent to fix prices.[199]

To prove a Sherman Act violation based on price dissemination among liquor manufacturers, Pennsylvania would have to prove that: (1) Prices are disseminated among the manufacturers; and (2) these price disseminations in fact affected prices[200] or there is proof of an agreement or intent to affect prices. Once a violation of the Sherman Act by the liquor manufactures is shown it is necessary to prove that the affirmation states are themselves involved in the conspiracy or combination restraining trade. In *Albrecht v. Herald Co.*,[201] a newspaper granted exclusive territorial routes to 172 carriers provided these carriers abided by maximum suggested retail prices. Plaintiff in this case raised his price above the maximum. The defendant publisher then hired Milne Circulation Sales, Inc. to solicit plaintiff's customers to direct delivery by one George Kroner. The new carrier was aware of the Albrecht conflict. The Court found that "there can be no doubt that a combination arose between respondent, Milne, and Kroner to force petitioner to conform to the advertised retail price."[202] In finding this combination the Court noted that both Milne and Kroner were aware of defendant's purpose. Although no agreement, implied or express, was present in *Albrecht*, the court found the restraint itself was sufficient to prove the combination in violation of the Sherman Act.

This lack of agreement also exists in the situation here considered. The states were involved in no agreement with the manufacturers restraining trade of liquor. However, a restraint re-

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197. *Id.* at 35. It is clear however that the court in *Utah Pharmaceutical* found an implied agreement to adhere.

198. *See* notes 181, 182, 191 and 192 and accompanying text *supra*.

199. *See* notes 183, 184, 188, 194 and 197 and accompanying text *supra*.

200. *See* note 192 *supra*. In Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939) the Court announced:

> It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators . . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

201. 390 U.S. 145 (1968).

202. *Id.* at 149.

sulted. To prove the involvement of the affirmation states in this restraint of trade, Pennsylvania must show:

1. The price list distributions to the manufacturers resulted in price control over the free market exercised by these manufacturers.
2. The affirmation states were aware the price lists were being distributed to the manufacturers.
3. The affirmation states were aware or should have been aware of the effect of these price lists on pricing practices of the manufacturers.
4. Uniform price increases by liquor manufacturers adversely affected the Pennsylvania citizens.
5. The affirmation statutes and agreements are a material element in the conspiracy to affect prices.

If Pennsylvania is unable to show that the affirmation agreements are directly related to the pricing conspiracy among manufacturers, there is no basis for finding the states in violation of the Sherman Act. Proving this involvement would be difficult, but several factors make such proof quite possible. First, the association disseminating the information to the manufacturers, the N.A.B.C.A., did not exist before affirmation agreements became prevalent. Second, the only states belonging to the association are affirmation states. Third, the only manufacturers belonging are those dealing in affirmation states. Fourth, the association was formed originally to assure compliance with the affirmation agreements. The affirmation agreements were therefore instrumental in the creation of the organization which produced Sherman Act violations. These states also encouraged the price dissemination by requiring the accumulation of such information for their own purposes. Linking the affirmation states with a price fixing conspiracy is possible though not probable.

C. *Affirmation Agreements As A Direct Restraint of Trade under The Sherman Act*

Rather than attempting to indict affirmation by proving a conspiracy among liquor manufacturers and linking the affirmation states to this conspiracy, it is also possible to prove that the affirmation system itself is a combination or conspiracy in restraint of trade. In examining whether the affirmation laws themselves create an unreasonable restraint of trade we must examine the specific effects of these laws, determine whether these effects restrain trade, and finally consider whether the unlawful combination itself exists.

Affirmation laws prohibit a manufacturer from giving purchasers quantity purchase price discounts. Thus, although Pennsylvania might purchase one thousand cases of a specific brand of liquor, affirmation laws prevent the manufacturer from giving Pennsylvania a lower price than a wholesaler in New York who purchases ten cases. This is true even though it can be shown that the manufacturer has far lower average costs in Pennsylvania resulting from the quantity sale. This additional burden borne by the Pennsylvania citizen effectively restrains trade in liquor in this state in the following manner. The price paid for a bottle of liquor is, for example, one dollar in Pennsylvania, the same price paid for this bottle in New York. With quantity discounting, however, the liquor would more likely cost ninety cents in Pennsylvania. Effectively, New York and the other affirmation states have imposed on Pennsylvania citizens an import tariff. This tariff is paid not to the affirmation states, but to the manufacturer in the form of excess profits.

Since only restraints which are unreasonable are illegal under the Sherman Act we must consider whether affirmation law restraints are reasonable. We therefore turn to an examination of the Robinson-Patman Act which, although forbidding price discrimination generally, specifically allows it in certain "reasonable" situations. The Robinson-Patman Act specifically allows for price discrimination resulting from reduced costs due to quantity sales. The purpose of the Act was to make price discrimination unlawful only where such discrimination tends to create monopoly or to injure, destroy or prevent competition and not to afford a shelter by which manufacturers could reap excessive profits. The Robinson-Patman Act specifically provides:

> [T]hat nothing contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .[203]

Robinson-Patman, therefore, specifically exempts price variances resulting from varied average costs. Affirmation statutes take away this exemption in contravention of federal law and indicate to some degree the unreasonableness of affirmation laws. The New York affirmation statute grants price variances only as follows:

> [P]rovided that nothing contained in paragraphs (d) and (c) of this subdivision shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery.[204]

It must be conceded that delivery costs are one of the elements which reduce the average cost of large quantity sales. To that extent the affirmation laws are in conformity with Robinson-Pat-

203. 15 U.S.C. § 13(a) (1961).
204. N.Y. ALCO. BEV. CONTROL § 101-b(9) (McKinney Supp. 1964).

man. However, there are many other cost reductions resulting from large quantity sales which are permissible under Robinson-Patman but denied by the affirmation laws. This result of affirmation laws, excessive cost to Pennsylvania citizens and excessive profits to manufacturers, contravene the intention of the Robinson-Patman Act and violate the Sherman Act through an unreasonable trade restraint.

In addition to inflated prices in Pennsylvania, affirmation laws also create artificial entry barriers into the manufacture and sale of liquor. These barriers lessen competition and result in inflated prices to Pennsylvania citizens. The following example will explain how these barriers result. A small manufacturer selling only in a single non-affirmation state decides to expand his selling market and, to meet competition in the second state, sells at a reduced price there. The manufacturer decides to expand to a third state. Realizing that he cannot maintain the low profit margin of state two in state three, he decides to sell in state three at the same price as in state one. However, he learns that both states two and three are affirmation states. There is, as a result of affirmation, an artificial barrier placed on entry into state three. That barrier is that the manufacturer must sell in state three at the same price he is selling at in state two. However, the manufacturer cannot sustain this low profit margin in both states. He therefore has two choices: retain his price in state two and not expand; or raise his state two price to a comfortable margin and sell in both states two and three at a higher price. Presuming that the manufacturer expands and Pennsylvania is state two, this state has suffered harm due to increased prices and reduced price competition.

In conjunction with the above argument it should be remembered that, although the primary purpose of the Robinson-Patman Act is to prevent price discrimination,[205] the act has been specifically interpreted to allow price reductions in certain circumstances to meet lower prices of competition.[206] The key factor in considering whether such price reductions are valid is whether they are made in good faith.[207] In analyzing the effect of New York's af-

205. *See* F.T.C. v. Anheuser-Busch, Inc., 363 U.S. 536 (1960). The Robinson-Patman Act was enacted to prevent the use of localized price cutting by financially powerful corporations attempting to lessen competition. *See also* F.T.C. v. Henry Broch & Co., 363 U.S. 166 (1960).

206. F.T.C. v. National Lead Co., 352 U.S. 419 (1957); Standard Oil Co. v. F.T.C., 340 U.S. 231 (1951); Gerber Products Co. v. Beech-Nut Life Savers, 160 F. Supp. 916 (D.C.N.Y. 1958); Triangle Conduit & Cable Co. v. F.T.C., 168 F.2d 175 (7th Cir. 1948).

207. *See* State v. Texaco, Inc., 14 Wis. 2d 625, 111 N.W.2d 918 (1961).

firmation statute on a manufacturer it must be remembered that if he makes a good faith price reduction in, for example, California, in order to meet low prices charged by local manufacturers of liquor, this reduction in price must also be given in New York. Since this price reduction in New York is not made in good faith to meet competition, but instead has the opposite effect, the manufacturer has been forced to unreasonably restrain trade.

The simplicity with which this unreasonableness is shown ignores the most important aspect of such violations. The price discrimination[208] resultant from the affirmation statute is not necessarily unreasonable. It must be shown that it is reasonably probable that such discrimination will have the effect of substantially reducing competition or will tend to create a monopoly.[209] In the *Joseph E. Seagrams v. Hostetter*[210] case, the Court recognized the possibility that the state affirmation statute could be in contradiction of the Robinson-Patman Act. However, proof of such a violation is extremely difficult. The affirmation agreements and statutes are so widespread that virtually no manufacturer is exempt from their effects. The result is that wholesale prices of liquor are virtually standard throughout the country and there are no quantity or local price discounts to meet local competition.

If it can be shown that affirmation laws have the effect of preventing expansion of manufacturers and corresponding price competition, these affirmation laws contravene the purpose of the exceptions to the Robinson-Patman Act and violate the Sherman Act restraint of trade provisions.

The sole consideration remaining is whether the affirmation states create the combination or conspiracy required for a Sherman Act violation. Traditionally, a finding of conspiracy under the Sherman Act has required some evidence of agreement whether formal or informal. In *Interstate Circuit v. United States*[211] such a conspiracy was held to exist where there was "[a]cceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce." In *Interstate Circuit,* film distributors agreed with certain first-run theater owners that they would not sell second-run rights to other theaters unless they agreed to specified minimum admission prices. Only two

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208. Price discrimination is proven merely by showing a price difference. F.T.C. v. Anheuser-Busch, Inc., 363 U.S. 536 (1960). *See also* Guyott Co. v. Texaco, Inc., 261 F. Supp. 942 (D.C. Conn. 1966).

209. Sano Petroleum Corp. v. American Oil Co., 187 F. Supp. 345 (D.C. N.Y. 1960).

210. 384 U.S. 35 (1966). *See* notes 156-57 and accompanying text *supra.* A state act is invalid if it conflicts with either the language or the policy of a federal act. *See* Franklin Nat'l Bank v. New York, 347 U.S. 373 (1954); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Hill v. Florida, 325 U.S. 538 (1945); Northern Securities v. United States, 193 U.S. 197 (1904).

211. Interstate Circuit v. United States, 306 U.S. 208, 217 (1939).

distributors agreed in writing to the restrictions. The Court indicated that:

> While the District Court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent—run exhibitors was not—prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, which, we will presently point out, was unreasonable within the meaning of the Sherman Act, and knowing it, all participated in the plan.[212]

Interstate Circuit is significant precedent in attempting to prove a conspiracy by the affirmation states, since it expressly rejects any requirement of a formal agreement among conspirators. It is certain no such formal agreement among the affirmation states could ever be proven. It is additionally relevant since it imposes Sherman Act sanctions for knowledge and acquiescence of collaborative action among the participants. The affirmation states were well aware of similar actions by other states. The final requirement of *Interstate Circuit* is troublesome, however. Showing that the affirmation states impliedly agreed or knew of the effect such affirmation laws would have on interstate commerce would be difficult to prove. It is obvious that an action by film distributors requiring specific minimum admission fees to second-run movies will restrain competition between such theaters and those theaters showing first-run movies. However, it is not obvious that demanding the lowest price for liquor will restrain interstate commerce unlawfully when considered in light of the twenty-first amendment which affords broad powers over liquor to the individual states. The proof of implied agreement in the typical conspiracy action under the Sherman Act could prove disastrous to the action.

Several recent cases involving restraint of trade seem to transfer the emphasis in such cases away from the agreement requirement to an emphasis on the restraint requirement. An early case, *F.T.C. v. Beechnut Packing Co.*,[213] began this trend. In *Beechnut,* the manufacturer refused to sell to dealers refusing to comply with minimum price requirements. Although no express compliance agreement existed, the Court found:

212. *Id.* at 226-27.
213. 257 U.S. 441 (1922).

> The specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose.[214]

The *Beechnut* Court seems to be tending toward elimination of any agreement requirement for a finding of conspiracy. It can readily be argued, however, that an implied agreement was, in fact, present.

In *United States v. Parke Davis & Co.*,[215] the Court held: "whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used."[216] Again the Supreme Court is placing the emphasis on the result, the restraint, rather than on the showing of agreement to restrain. This movement in the direction of restraint is emphasized in *Albrecht v. Herald Co.*[217] wherein the Court specifically distinguishes conspiracies from combinations:

> On the undisputed facts recited by the Court of Appeals respondent's conduct cannot be deemed wholly unilateral and beyond the reach of § 1 of the Sherman Act. That section covers combinations in addition to contracts and conspiracies, express or implied.[218]

Albrecht finds a distinction between a conspiracy, which by definition requires some finding of agreement, and combination, which does not necessitate such a finding of agreement.

In the *Albrecht* case, in addition to distinguishing between traditional conspiracies and combinations the Court seemed to suggest that an unwilling or unsuspecting party could constitute part of such a combination. Thus, in a footnote, the majority commented:

> Petitioner's amended complaint did allege a combination between respondent and petitioner's customers. Because of our disposition of this case it is unnecessary to pass on this claim. It was not, however, a frivolous contention.[219]

It is significant that the Court recognized that an unsuspecting individual (the customers here lacked knowledge of any restraint of trade implications involved in merely changing the party from whom they purchased newspapers) could be party to a restraint of trade violation since the typical conspiracy case has always required some finding of agreement. There can be no agreement, even implied, by a person who lacks all knowledge of what is occurring. An extension of *Albrecht* would permit a finding of combination where there was no indication of agreement by any

214. *Id.* at 455.
215. 362 U.S. 29 (1960).
216. *Id.* at 44.
217. 390 U.S. 145 (1968).
218. *Id.* at 149.
219. *Id.* at 150 n.6.

parties involved. In *Albrecht* the newspaper was fully aware of its actions, whereas in the affirmation situation it must be presumed that no one is aware. This extension of *Albrecht* is a large one.

Albrecht further indicates that a finding of a combination forcing maintainance of a specified price constitutes a restraint of trade violation:

> It is our view, therefore, that the combination formed by the respondent in this case to force petitioner to maintain a specified price for the resale of the newspapers which he had purchased from respondent constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act.[220]

The Court found that proof of the combination, with a purpose of fixing maximum prices, was sufficient of itself to constitute an illegal restraint of trade. Quoting from *Kiefer-Stewart Co. v. Seagram & Sons* the Court in *Albrecht* found:

> [A]greements to fix maximum prices "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."[221]

Since the affirmation statutes by their specific terms, force minimum prices on the manufacturers, the sole consideration is whether the combination itself can be proved. If the *Albrecht* case can be extended in the manner previously discussed, proof of the combination necessary to show a restraint of trade violation by the affirmation states might be accepted by the courts.

VII. CONCLUSION AS TO THE COMMERCE CLAUSE

Any control over the sale of alcoholic beverages must be considered in light of the twenty-first amendment.[222] Analysis of the conflict between the twenty-first amendment and the commerce clause indicates that liquor affirmation laws must comply with federal commerce clause powers.[223] Therefore, affirmation laws cannot lawfully result in an unreasonable restraint of trade under the Sherman Act.[224] In examining affirmation laws in light of the Sherman Act we first determine whether any state action can be violative of this statute.[225] Concluding in the affirmative,

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220. *Id.* at 153.
221. *Id.* at 152 *quoting* Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213 (1951).
222. *See* note 12 *supra*.
223. *See* text accompanying notes 155-57 *supra*.
224. *See* text accompanying notes 164-68 *supra*.
225. *See* text accompanying notes 171-80 *supra*.

we next consider possible attacks on the affirmation laws under the Sherman Act. There are two plausible arguments upon which to base a contention that the states having affirmation laws have violated the Sherman Act. First, affirmation laws or agreements result in unlawful combinations under the Sherman Act.[226] Sustaining this allegation against the affirmation states requires proof that liquor manufacturers combined unlawfully and exchanged current price information with an intent or agreement to affect prices.[227] This pricing conspiracy must be then directly linked to the affirmation agreements of the states.[228] The second basis for finding the affirmation states in violation of the Sherman Act is to prove that these affirmation agreements directly and unlawfully restrained trade.[229] This might be proved through direct testimony of manufacturers who were prevented from selling in certain states due to affirmation.[230] Further proof of the restraint is a showing that no quantity purchase discounts are permitted under affirmation laws.[231] Finally, the unreasonableness of this restraint might be shown by proving affirmation substantially reduces competition or tends to create a monopoly.[232] The extraordinary burden of proof in any Sherman Act case coupled with the additional burden here of having states as defendants makes the possibility of success in an attack on affirmation laws doubtful.

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226. *See* text Section V, subsection B.
227. *See* text accompanying notes 181-200 *supra*.
228. *See* text accompanying notes 201-02 *supra*.
229. *See* text Section V, subsection C.
230. *See* text accompanying notes 63-68 *supra*.
231. *See* text accompanying notes 203-04 *supra*.
232. *See* text accompanying notes 205-09 *supra*.